No. 12,514

IN THE

United States Court of Appeals

For the Ninth Circuit

ORESTUS CAVNESS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

BRIEF FOR APPELLEE.

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JURISDICTION.

Section 3231 of Title 18, U.S.C., confers jurisdiction upon the Court below; and Sections 1291 and 1294 of Title 28, U.S.C., grant appellate jurisdiction to this Honorable Court.

STATEMENT OF THE CASE.

On September 15, 1949, the Grand Jury of the United States District Court for the District of Hawaii charged Orestus Cavness, the defendant and appellant herein, with a violation of Section 2553(a),

Title 26, United States Code, in the following indictment:

(Title of District Court and Cause)

INDICTMENT

The Grand Jury charges:

That on or about the 19th day of July, 1949, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Orestus Cavness, did knowingly, wilfully, unlawfully and feloniously purchase a derivative of coca leaves, to wit, 8 capsules, each containing cocaine which said cocaine was not then and there in the original stamped package and was not from the original stamped package, in violation of Section 2553(a), Title 26, United States Code.

Dated: Honolulu, T. H., this 15th day of September, 1949.

A True Bill,

/s/ HERMAN L. NICKELS,
Foreman, Grand Jury.

/s/ RAY J. O'BRIEN,
United States Attorney.

(Endorsed): Filed September 15, 1949.

The appellant pleaded not guilty to this indictment on October 10, 1949.

The case was called for trial on December 5, 1949, and after detailed examination by counsel for the appellant, a jury was duly empaneled and sworn (R. 12, 614).

At the commencement of the trial, a motion for the suppression of evidence was filed by the appellant (R. 8-11), but consideration of the motion was postponed pending a proffer of evidence to which it would be applicable (R. 53). After a hearing which lasted two days and included the taking of testimony, the motion to suppress was denied (R. 264-268).

On July 19, 1949, Bureau of Narcotics Agent William K. Wells, in company with officers of the Honolulu Police Department, endeavored to serve a search warrant (R. 5-7) on the appellant as he was climbing out of his automobile in the driveway of his residence at 3811 Leahi Avenue, City and County of Honolulu, Territory of Hawaii (R. 51, 52). Before service of the search warrant could be effected by Wells, the appellant shoved him (R. 52, 201, 202, 284, 306, 361, 401). At the time the appellant resisted the service of the search warrant, he had a Vicks Inhaler Tube in his hand which he tried to destroy by chewing it (R. 52, 53, 202, 281, 361, 363). Wells, with the assistance of the Honolulu Police Department officers, arrested and finally subdued the appellant. Eight capsules containing cocaine (R. 334, 340, 341), two of which were adhesed to the inside of the broken top of the Vicks Inhaler Tube, and parts of the broken Vicks Inhaler Tube were found on the lawn at the scene of the struggle (R. 54, 55, 203, 206, 244, 256, 285, 364). The lawn was otherwise clean (R. 206). It is to be noted that these capsules containing the cocaine fell from the appellant's hand during the struggle (R. 202, 281, 285).

Possession by the appellant on July 19, 1949, of cocaine not in or from the original stamped package having been proved, the appellant took the stand and flatly denied such possession (R. 489). That the jury did not believe him is apparent from the verdict of guilty which was returned on December 14, 1949, after seven days of trial.

After argument had been presented by counsel, and the jury had been instructed by the Court, but before the jury was locked up for the purpose of carrying on its deliberations and arriving at a verdict, juror Herbert A. Clark asked the United States Marshal if he could make a personal telephone call. Under the supervision of a Deputy United States Marshal, Mr. Clark made two telephone calls, one to his garage to make arrangements concerning his car, and the other to his home to advise his wife that he would be delayed (R. 541-609).

QUESTIONS PRESENTED AND SUMMARY OF ARGUMENT.

1. Was the seizure of the contraband cocaine the fruit of an unlawful search?

The seizure was lawful for the following reasons:

(a) The officers had a valid search warrant and lawfully entered the appellant's premises for the purpose of serving and executing that warrant (R. 3-7, 51, 52, 75).

(b) (1) The efforts of the officers to subdue the appellant, which resulted in the disclosure of his

possession of the eight capsules of cocaine, were lawful in that such efforts constituted an arrest of appellant for a violation of the Act of June 25, 1948, c. 645, § 21, 62 Stat. 862, 18 U.S.C. 2231, committed in their presence (R. 52, 201, 202, 251, 284, 306, 361, 401).

(2) The officers had probable cause to believe the appellant had had in his personal possession contraband narcotics acquired in violation of the Act of December 17, 1914, c. 1, § 1, 38 Stat. 785, as amended, 26 U.S.C. § 2553(a), and seizure of the cocaine pursuant to the arrest of the appellant for this violation was lawful, even though no formal incantation was recited by the arresting officers (R. 3, 4, 202, 281, 361).

(c) The officers had probable cause to believe the appellant had narcotics in his personal possession which he was attempting to destroy or discard, and consequently their search for and seizure of the cocaine was reasonable and lawful even if they had not been armed with a search warrant and had not been making a lawful arrest (R. 3, 4, 202, 281, 361).

(d) When contraband narcotics are exposed to open view and no search is required as in the instant case, the seizure of such narcotics is not unlawful (R. 54, 55, 203, 206, 244, 256, 285, 364).

2. Did the trial Court err in denying appellant's motion for a mistrial after a witness for the United States testified "* * * that the defendant was 'hopped up' " and the trial Court promptly struck the state-

ment and directed the jury "to disregard it" (R. 402, 403, 431, 432)?

No, the trial Court in denying the motion for a mistrial acted in an area of discretion and such prejudice to the appellant as might have resulted from the statement of the witness was cured by the trial Court's prompt action.

3. Was there adequate proof that the cocaine seized by the officers was not in the original stamped package?

(a) Yes (R. 463, 465, 517). The cocaine itself was evidence that it was not in the original stamped package or from the original stamped package (R. 60, 63, 67, 69, 209, 294, 340, 341).

(b) Even if there had been no evidence that the cocaine was not in or from the original stamped package, it would not have mattered, as proof of negative averments contained in an indictment is unnecessary.

4. Did the presence of Mr. Samuel A. Parish, a reserve police officer, on the jury so prejudice the defendant as to deprive him of a fair trial?

(a) No.

(b) This information was available to the appellant but he never asked Mr. Parish for it (R. 614).

5. Was the appellant denied a fair trial because one of the jurors, Mr. Herbert A. Clark, left the Court room to make two telephone calls unrelated to the case before the jury was locked up?

No, the appellant was not prejudiced by this, and it was in accord with established custom.

ARGUMENT.

I. LAWFUL SEIZURE.

A. The officers were seeking to serve and execute a valid search warrant.

The affidavit of Gerry Wilson, which was the basis for the search warrant, was sufficient in that violations of Section 2553(a), Title 26, United States Code, are set forth therein, with the assertion of the affiant under oath that she believes contraband narcotics are still on the premises defined in the warrant (R. 3, 4). This affidavit sufficed to give the United States Commissioner probable cause for the issuance of the search warrant. 47 A.J. 517-519.

Appellant argues (Appellant's Brief, p. 5) that the evidence reveals the affiant made no purchase of cocaine from the appellant on July 10, 1949, the date set forth in the affidavit. The appellant urges that such error in the affidavit undermines and renders invalid the search warrant issued thereon.

The record does not support the appellant's contention that the date of July 10, 1949, set forth in the affidavit is erroneous. The evidence shows that the affiant made a purchase of cocaine from the appellant on or before July 7, 1949 (R. 185, 196), but from the affidavit it is evident that the affiant made

many purchases of cocaine from the appellant and, having so stated under oath, it must be assumed that she in fact made a purchase of cocaine on July 10, 1949. Mr. Wells' testimony that the date of July 10, 1949, was erroneous was based on assumption and was not competent (R. 180-197).

Even assuming the date of July 10, 1949, was erroneous, such error does not invalidate the search warrant, as facts are alleged in the affidavit which gave the United States Commissioner probable cause to believe that contraband narcotics were on the appellant's premises at the time the warrant was issued. At most, there was a three-day discrepancy in the date, and this certainly did not prejudice the appellant in any manner. *Pera v. United States,* 11 F. (2d) 772 (1926—9 C.C.A.). In support of his position the appellant has cited the case of *Welchance v. State,* 114 S.W. (2d) 781, 173 Tenn. 26. In that case, a hearsay affidavit charging the defendant with possession of liquor in violation of State law was filed, and no date was set forth in the affidavit. In the *Welchance* case, the Court at page 782 quotes from *People v. Holton,* 326 Ill. 481, 158 N.E. 134, 137, as follows: "The search warrant, it is asserted, was void because the complaint failed to show probable cause for its issuance, since it stated that Miller bought liquor from plaintiff in error on December 14, 1925, and the complaint was not verified until ten days later. No hard and fast rule concerning the time within which the complaint should be made can be estab-

lished, except that it should not be too remote." In the instant case, assuming a discrepancy of three days, such discrepancy certainly would not make the affidavit in support of the search warrant too remote, especially when in the affidavit a course of conduct by the appellant extending over a considerable period of time is alleged.

To invalidate a search warrant, it is incumbent upon the defendant to show the United States Commissioner lacked probable cause for its issuance. *United States v. Napela,* 28 F. (2d) 898, 903 (1928); *United States v. Rellie,* 39 F. Supp. 21, 22 (1941). This, the appellant has failed to do.

B. The first restraint of the appellant by the officers was a lawful arrest.

1. Appellant's resisting service of the search warrant gave the officers lawful grounds to arrest him. When Narcotics Agent Wells endeavored to serve the search warrant on the appellant, the appellant violently pushed him (R. 52, 201, 202, 284, 306, 361, 401). This was a violation of Section 2231, Title 18, United States Code, committed in the presence of the officers, and constituted grounds for a lawful arrest. *Marron v. United States,* 275 U.S. 192, 198 (1927); 47 A.J. 528. The appellant having assaulted Agent Wells and having jumped out of his automobile, there was no time for a formal laying on of hands and recital of the standard formula, "You are under arrest for a violation of * * *" It was the

intention of the officers to arrest the appellant (R. 251), and physical restraint of the appellant's person was sufficient to constitute a lawful arrest. 6 C.J.S. 571, 4 A.J. 7.

Consequently, the disclosure of the cocaine which appellant had been carrying concealed in a Vicks Inhaler Tube in his hand resulted not from an unlawful search but from a lawful attempt by the officers to arrest him.

2. The arrest of the appellant was also lawful as an arrest for violaation of Section 2553(a), Title 26, United States Code. The officers had reliable information that the appellant had dealt in narcotics at 3811 Leahi Avenue, Honolulu, T. H., in violation of Section 2553(a), Title 26, United States Code (R. 3, 4). Their arresting of the appellant after he pushed Narcotics Agent Wells could be further justified as a lawful arrest for the illegal sale of cocaine to affiant Gerry Wilson. Having such reliable information that the appellant had committed a felony, it was not necessary that the officers obtain a warrant for his arrest.

Seizure of the cocaine pursuant to such a lawful arrest, based either on the appellant's violation of Section 2231, Title 18, United States Code, or his previous violation of Section 2553(a), Title 26, United States Code, was a lawful seizure. *United States v. Rabinowitz,* 339 U.S. 56 (1950).

C. Appellant was committing a violation of Section 2553(a), Title 26, United States Code, in the presence of officers, and his arrest and the seizure of cocaine were consequently lawful.

The reliable information which the officers had that appellant was in the practice of selling narcotics at 3811 Leahi Avenue, coupled with his resistance to service of the search warrant (R. 52, 201, 202, 251, 284, 306, 361, 401) and his endeavors to destroy the Vicks Inhaler Tube (R. 202, 281, 361) which he was carrying in his hand and which contained the cocaine, gave the officers probable cause to believe he had contraband narcotics in his possession. Under the circumstances of this case, the restraint or arrest of the appellant and the seizure of the cocaine, which was in the nature of *caput lupi,* were both reasonable and lawful. *Carroll v. United States,* 267 U.S. 132, 147 (1925); *United States v. Rabinowitz, supra,* at 60-65; *Stobble v. United States,* 91 F. (2d) 69, 71 (1937—7 C.C.A.); *United States v. Sebo,* 101 F. (2d) 889, 890 (1939—7 C.C.A.).

D. Seizure of cocaine not in or from the original stamped package and which is exposed to public view does not violate the Fourth Amendment.

The officers were lawfully on the appellant's premises for the purpose of serving and executing the search warrant. On any of the theories outlined above, their arrest of the appellant was lawful.

It is submitted that when contraband cocaine is disclosed during the course of a lawful arrest, the seizure of such cocaine does not violate the provisions of the Fourth Amendment, which is only applicable

when it is necessary to make a search for the contraband articles. *Brady v. United States,* 148 F. (2d) 394, 395 (1945—9 C.C.A.).

If this Court should find that the officers did in fact make a search of the appellant's person in the course of making the arrest and that such search was responsible for the disclosure of the cocaine which he was carrying and attempting to destroy or discard, it is submitted that such search was lawful as being incident to a lawful arrest. Such search can also be supported under the doctrine of necessity set forth in the *Carroll* case.

If this Court should find that the cocaine was not exposed to the public view by the appellant prior to its seizure, and that it was necessary for the officers to search the lawn to find the cocaine, it is respectfully submitted that such a search of the lawn was authorized by the search warrant (R. 5-7). 56 C.J. 1234.

II. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A MISTRIAL.

During the course of the trial, prosecution witness Alfred A. Sousa was asked the following question (R. 402): "Q. Did you and the other officers have any difficulty in subduing the defendant?", to which Sousa answered: "A. Yes, we did; the defendant was very powerful. It seemed to me that the defendant was 'hopped up'." Counsel for the appellant promptly moved that the answer be stricken, and

the Court in striking it said (R. 403): "Definitely it may go out, and the jury is instructed to disregard it. Just answer the question that is asked you." This matter was never adverted to again in the presence of the jury.

Later, the appellant moved for a mistrial, which motion was denied (R. 431). In denying the motion, the Judge, who was in the best position to see the effect Sousa's statement and his instruction with reference to that statement had had on the jury, acted properly within an area of discretion. *Christensen et al. v. United States,* 16 F. (2d) 29, 30 (1926—9 C.C.A.); *Hazeltine v. Johnson,* 92 F. (2d) 866, 869, 870 (1937—9 C.C.A.); 5 C.J.S. 1033.

It is believed that the statement of the Trial Judge quoted by this Court in the *Christensen* case is particularly appropriate, "In this day and age, intelligent men, with honest motives, do not readily yield to the promptings of caprice, and courts may confidently depend upon their unbiased judgment when properly instructed touching their duty in exigencies of the character here impending."

III. THE APPELLANT WAS NOT ENTITLED TO JUDGMENT OF ACQUITTAL ON THE GROUND THERE WAS NO EVIDENCE THE COCAINE WAS NOT IN OR FROM THE ORIGINAL STAMPED PACKAGE.

The capsules containing the cocaine and the broken parts of the Vicks Inhaler Tube, which were introduced in evidence as United States Exhibits Nos. 1,

2-A and 2-B, in themselves evidence the fact such cocaine was not in or from the original stamped package. In tracing the possession of the cocaine from the time of its seizure to the time it was introduced in evidence, each of the officers testified there had been no change in its condition, and the Government chemist, Gilbert J. Carr, testified that he had made no changes other than to remove part of the cocaine from some of the capsules for purposes of chemical analysis (R. 60, 63, 67, 69, 209, 294, 340, 341). Counsel for appellant on two occasions moved for a judgment of acquittal on the ground that there was no evidence the cocaine was not in or from the original stamped package. Both times, this motion was denied (R. 463, 465, 517), and it must be assumed both from the jury's verdict and from the denial of these motions that no tax paid stamps were on the Vicks Inhaler Tube or the capsules containing the cocaine.

While the capsules of cocaine and the broken parts of Vicks Inhaler Tube in which the cocaine had been concealed were not evidence that such cocaine did not come from an original stamped package, such evidence was not required. *Flowers v. United States,* 83 F. (2d) 78, 81, 82 (1936—8 C.C.A.); *Nicoli v. Briggs,* 83 F. (2d) 375, 379 (1936—10 C.C.A.); *Williams et al. v. United States,* 138 F. (2d) 81 (1943—App. D.C.); 153 A.L.R. 1254. In the *Flowers* case, the appellant contended that there was no proof the morphine did not come from an original stamped package. The Court said that the insistence of the appellant "carries with it the necessity for the proof

of an element of negation ordinarily impossible of proof". The burden of proving that the cocaine came from an original stamped package was on the appellant. *Casey v. United States,* 276 U.S. 413 (1928). In the instant case, the appellant did not endeavor to sustain such proof, but simply denied possession of the cocaine (R. 489).

IV. THE APPELLANT WAS NOT DENIED A FAIR TRIAL BECAUSE A RESERVE POLICE OFFICER SERVED ON THE JURY.

After the conclusion of the trial and after the jury had returned its verdict, the appellant filed an Alternative Motion for a New Trial and charged in that motion that the appellant's rights had been seriously prejudiced because one of the jurors, a Mr. Samuel A. Parish, was a reserve police officer (R. 25-29). An examination of the record reveals that while counsel for the appellant asked all other prospective jurors whether they were reserve police officers, he did not ask any questions of Mr. Parish (R. 614). To offset this want of diligence, the appellant points out that a general question was asked of the jury panel as to whether any member of the jury was or ever had been a reserve officer of the Honolulu Police Department, and that Mr. Parish failed to respond to that question. In fact, Mr. Miho, counsel for the appellant, asked of a Mr. Kramer the following question: "Have any of you jurymen served as police reserve officers in the police force at any time?" (R.

540). Nowhere in the record does it appear that Mr. Parish heard this general question or that he ever *served* as a reserve police officer (R. 614).

As a matter of law, Mr. Parish's status as a reserve police officer did not disqualify him to serve as a juror. Act of June 25, 1948, c. 646, § 39; 62 Stat. 992; § 1861, Title 28, United States Code. Act of April 30, 1900, c. 339, §§ 83 and 84; 31 Stat. 157; § 635, Title 48, United States Code. Act of May 27, 1910, c. 258, § 6; 36 Stat. 447; § 636, Title 48, United States Code. Revised Laws of Hawaii, 1945, Secs. 9791 and 9792. It is submitted that the Trial Judge was correct when he said that Mr. Parish's reserve police officer status "* * * might well have served, if known, as a basis for the defendant's exercising one of his peremptory challenges," (R. 613) but counsel for the appellant did not exercise due diligence in his questioning of Mr. Parish, and the appellant cannot now claim that he was prejudiced. 39 A.J. 64, 65.

Membership in a reserve police officer association, particularly where it is not shown whether such membership was active or inactive, does not raise a presumption that Mr. Parish was biased. *Remus v. United States,* 291 Fed. 501, 506-509 (1923—6 C.C.A.); 50 C.J.S. 976, 977. To invalidate the verdict, the appellant must show actual bias, and this has not been done in the instant case. *Frazier v. United States,* 335 U.S. 497, 510 (1948); *Dennis v. United States,* 339 U.S. 162, 167 (1950).

The appellant has cited the case of *United States v. Lampkin,* 66 F. Supp. 821, 824, but in that case the

appellant had failed to answer questions put to him on *voir dire* as a prospective juror, truthfully, and had been held in contempt. That case turned neither on the question of whether diligence had been exercised by counsel nor on the question of whether the information withheld by the juror would have revealed that he was biased.

V. THE FACT THAT ONE OF THE JURORS MADE TWO TELEPHONE CALLS UNRELATED TO THE CASE BEFORE THE JURY COMMENCED ITS DELIBERATIONS DID NOT PREJUDICE THE APPELLANT.

In the instant case, after the jury had been instructed by the Court and arguments made by counsel, one of the jurors, Mr. Herbert A. Clark, obtained permission from the Marshal to make a telephone call to his garage (R. 543, 555, 565). Mr. Clark was then taken by Deputy Marshal Moses to the Marshal's office to make the telephone call. In addition to calling the garage, Mr. Clark endeavored to call his wife, but at no time while he was separated from the other jurors did he have any conversation with anyone concerning the case (R. 591, 593, 604). At the time he made these telephone calls, the jury had not been locked up, had made no attempt to select a foreman, and had not commenced its deliberations (R. 557, 586, 587). All this was in accord with standard custom (R. 549).

As the Trial Judge said, the making of these two innocent 'phone calls by Mr. Clark did not preju-

dice the appellant in any way (R. 615). As was said in *Baker v. Hudspeth,* 129 F. (2d) 779, 782 (1942—10 C.C.A.), "The purpose of keeping the jury in one body during the trial of the case and not permitting them to separate except under the supervision of the bailiff or officers of the Court is to make sure that nothing they read, see or hear shall influence them in the consideration of the case committed to them." That purpose was not defeated by Mr. Clark's temporary separation from the other jurors, during which time he was in the custody of and under the supervision of a Deputy Marshal. The Supreme Court has recognized and sanctioned the separation of jurors when proper precautions are taken to safeguard the integrity of their verdict. *Holt v. United States,* 218 U.S. 245, 250, 251 (1910). In *Baker v. Hudspeth, supra,* at page 782, the Court asserted a principle which covers the instant situation:

> "* * * we must not permit the integrity of the jury to be assailed by mere suspicion and surmise; it is presumed that the jury will be true to their oath and conscientiously observe the instructions and admonitions of the court."

The record reveals that Mr. Clark understood his obligations as a juror and lived up to them (R. 604).

CONCLUSION.

It is respectfully submitted that the evidence adduced at the trial of this cause adequately supports the verdict, that the Trial Court did not err in any matter brought before it in the trial of this case, and that the judgment of that Court should be affirmed.

Dated, Honolulu, T. H.,
September 29, 1950.

Respectfully submitted,

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